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IN THE

Supreme Court of the United States

October Term, 1965

No. 502

RAYMOND DENNIS, et al.,

Petitioners,

v.

UNITED STATES OF AMERICA.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF FOR THE PETITIONERS

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE PETITIONERS

Opinions Below

The opinion of the court below supporting the judgment sought to be reviewed (R. 384) is reported at 346 F. 2d 10. The opinion of the court below reversing the judgments of conviction against petitioners at their first trial under the indictment (R. 1) is reported at 302 F. 2d 5. The opinion of the District Court for the District of Colorado denying the defendants' motion to dismiss the indictment (R. 8) is reported at 160 F. Supp. 787.

Jurisdiction

The judgment of the Court of Appeals was entered on April 26, 1965 (R. 404). A petition for rehearing and two supplements thereto were denied on June 28, 1965. By order of Mr. Justice White, the time for filing a petition for certiorari was extended to August 27, 1965. The petition was filed August 26, 1965, and was granted November 15, 1965, limited to the first three questions stated in the petition. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

Questions Presented

Petitioners and others were indicted in 1956 under the fraud clause of the general conspiracy statute (18 U. S. C. 371) for conspiring to defraud the United States by causing to be filed with the National Labor Relations Board false affidavits denying membership in and affiliation with the Communist Party. The affidavits were filed pursuant to Section 9(h) of the Taft-Hartley Act, 29 U. S. C. 159(h), repealed in 1959, which made applicable to such affidavits the provisions of the so-called "false statements" statute, 18 U. S. C. 1001. The questions, as stated in the petition and quoted in the Court's order (R. 427), are:

(1) Whether the indictment states the offense of conspiracy to defraud the United States;

(2) Whether, in the comparative light of *American Communications Ass'n* v. *Douds*, 339 U. S. 382, and *United States* v. *Archie Brown*, 381 U. S. 437, Section 9(h) of the Taft-Hartley Act is constitutional; and

(3) Whether the trial court erred in denying petitioners' motions for the production, to the defense or the Court, of grand jury testimony of prosecution witnesses.

Statutes Involved

The relevant provisions of the Constitution of the United States, the federal conspiracy statute (18 U. S. C. 371), the "false statements" act (18 U. S. C. 1001), the National Labor Relations Act as amended by the Labor-Management Relations Act of 1947 (29 U. S. C. 159), and Section 504 of the Labor-Management Reporting and Disclosure Act of 1959 (29 U. S. C. 504), are set forth in the Appendix, *infra*, pp. 1a-3a.

Statement of the Case

The one-count indictment (R. 1), returned November 16, 1956, in the United States District Court for the District of Colorado, charged the six petitioners and eight others with conspiracy to defraud the government, in violation of the fraud clause of the general conspiracy statute (18 U. S. C. 371). All of the defendants were or had been officers or staff employees of the International Union of Mine, Mill and Smelter Workers, hereinafter called "Mine-Mill".

Section 9(h) of the Taft-Hartley law provided that labor unions desiring to use the facilities of the National Labor Relations Board must establish a compliance status, for which it was required that affidavits by the union's "officers", denying membership in or affiliation with the Communist Party,[1] be on file with the Board. The gravamen of the charge in the indictment is that the accused conspired to defraud the United States by effecting Mine-Mill's compliance, through having those defendants who were Mine-Mill officers file affidavits falsely denying that they were members of or affiliated with the Communist Party. The affidavits in question were filed from 1949 to 1956.

The defendants moved to dismiss the indictment on the grounds, *inter alia*, that Section 9(h) was unconstitutional, that the prosecution was in part barred by the statute of limitations, and that the indictment failed to state the offense of conspiracy to defraud the government within the rule of *Bridges* v. *United States*, 346 U. S. 209. This motion was denied in March, 1958. *United States* v. *Pezzati*, 160 F. Supp. 787.

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[1] Section 9(h) also required that the affidavits deny "belief in" and "support of" any organization teaching violent overthrow of the United States government, but the indictment does not involve that part of the statute, and the jury was so instructed (R. 339).

Eleven of the accused stood trial in 1959 and nine were convicted.[3] In March, 1962, the Court of Appeals reversed the judgments of conviction with instructions to dismiss the indictment as to two of the defendants. *Dennis* v. *United States*, 302 F. 2d 5. The seven remaining defendants were tried again in 1963; the jury acquitted one and convicted the six petitioners. The Court of Appeals affirmed the judgments of conviction and denied a petition for rehearing timely filed, and supplemented following the decisions of this Court in *Baxa* v. *United States*, 381 U. S. 353, decided May 24, 1965,[5] and *United States* v. *Archie Brown*, 381 U. S. 437, decided June 7, 1965.

Mine-Mill is a union operating in the non-ferrous metals field. Its compliance with the Taft-Hartley filing requirements and use of the Board's facilities are not disputed. Nor is it disputed that non-Communist affidavits were made and filed by the four petitioners who were officers of Mine-Mill during the period covered by the indictment.[6]

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[3] Three of the 14 accused pleaded nolo contendere, and two were acquitted by direction of the trial judge at the close of the government's case.

[5] This decision related to the trial court's refusal to instruct the jury with respect to the "vicarious admissions" and the application to them of the requirement of "furtherance", specified as part of question (5) in the petition for certiorari.

[6] One of the petitioners (Sanderson) has never been an officer, and another (Skinner) was not an officer during the indictment period. Two others (Dennis and Dichter) became and still are officers and filed affidavits during the indictment period (Dennis from late 1949 to 1956 and Dichter only in 1955 and 1956), but were not such at the time (June, 1949) that the conspiracy is alleged to have been formed. The other two (Travis and Wilson) were officers and filed affidavits at that time; Wilson ceased to be an officer in 1953, but is still an employee of Mine-Mill, while Travis ceased to be an officer or in any way connected with Mine-Mill in 1955.

The prosecution's evidence[5] of conspiracy among the defendants was intended to establish that:

(1) Following enactment of the Taft-Hartley Law in 1947, Communist Party policy opposed compliance;

(2) The defendants were then members of the Communist Party, and caused Mine-Mill to follow the Communist policy of non-compliance;

(3) In 1949, the Communist Party changed its policy and instructed Party members who were union officers to file non-Communist affidavits, and to resign formally from the Party but retain a clandestine membership;

(4) In accordance with the new Party policy, Mine-Mill officers filed non-Communist affidavits and the union obtained compliance status;

(5) The defendants at that time (June, 1949) agreed that the union officers among them would secretly remain Party members and would file false affidavits; and

(6) That agreement (i.e., the conspiracy) continued and was executed by repeated false filings up to the time of the indictment.

It is not disputed that Mine-Mill opposed the Taft-Hartley law and did not comply with the filing provisions until July, 1949, when, by Executive Board action, the union decided to comply. This decision was ratified in September at the union's annual convention.

Direct evidence of conspiracy among the defendants is entirely lacking. As indirect evidence, the prosecution and the court below relied chiefly on the asserted "paral-

[5] Despite the elimination of questions (4), (5) and (6) specified in the petition for certiorari, the evidence in this case remains relevant to the determination of question (3), involving the trial court's denial of defense motions for production of the grand jury testimony of four of the five major prosecution witnesses.

lelism" between Communist Party and Mine-Mill policies with respect to compliance, on testimony concerning statements by petitioners Travis and Wilson in 1949, and especially on a public statement by Travis in August, 1949, that he had been a member of the Communist Party and had resigned from it "in order to make it possible for me to sign the Taft-Hartley affidavit" (G. Ex. 8; R. 146).[6]

In the course of trial,[7] the district court denied defense motions for production (alternatively to the defense or to the court for *in camera* inspection) of the grand jury testimony of three prosecution witnesses (R. 64-66, 256, 309, 312). The court likewise admitted the record of testimony given at the first trial by the subsequently deceased government witness Mason, overruling defense objections based on rulings made at the first trial which had deprived the defense of access to Mason's grand jury testimony, and thus of full opportunity to cross-examine him at the first trial (R. 89-91). In charging the jury, the district judge failed to instruct them that fraud was an essential element of the offense charged (R. 323-50).

The indictment charged nothing against the defendants with respect to their knowledge of the aims of the

[6] Travis was indicted for and convicted of the substantive offense of filing false affidavits, but, after two trials, his conviction was set aside by this Court on the ground of improper venue. *Travis v. United States*, 364 U. S. 631. He was not thereafter reindicted.

[7] The defense case, largely irrelevant to the questions now open for review, included testimony that Mine-Mill policies with respect to compliance or non-compliance with the Taft-Hartley Law were determined openly and democratically; the offer of authenticated government records (excluded by the court) showing that many other labor organizations had followed substantially the same compliance policies and at the same times; and the offer of travel and per diem vouchers of the petitioner Dichter (excluded by the trial court) to establish what amounted to an alibi (R. 317-22, and Defs. Exs. Q-1 to Q-5 for Ident. (R. 379-83)).

Communist Party, legal or illegal, their intent to promote or achieve those aims, or their activities as Communist Party members. Nor did it charge them with any state of mind or intent regarding the overthrow of government by force and violence. Other than on the question of compliance or non-compliance with the Taft-Hartley law, no evidence of petitioners' attitudes toward Communist Party objectives was offered. The jury was given no instructions bearing on these matters. Thus the case has proceeded from the outset, and throughout on the basis that under Section 9(h), bare Communist Party membership was sufficient to establish the unlawful element in the conspiracy charged in this indictment.

Summary of Argument

I.

The indictment fails to state the offense of conspiracy to defraud the United States. A. The indictment charges only a conspiracy to commit an offense, to wit, a violation of the False Statements Act, 18 U.S.C. 1001. This Court has said and lower courts have held that 18 U.S.C. 1001 applies to merely false statements, and that fraud is not an element of that offense. *United States* v. *Grainger*, 346 U.S. 235, 242-43; *Marzani* v. *United States*, 168 F.2d 133 (C.A.D.C.). The indictment invokes the language of the fraud clause, but the stated objective of the conspiracy is nothing more than violation of 18 U.S.C. 1001. Thus the fraud language is a mere cloak, and the offense of conspiracy to defraud is not made out, since fraud is not an essential element of that offense. *Bridges* v. *United States*, 346 U.S. 209 (8 U.S.C. 746, naturalization); *United States* v. *Lurie*, 222 F.2d 11 (C.A.7) (18 U.S.C. 1001). The government's efforts to distinguish these authorities are futile, the petitioners have been seriously prejudiced (as-

suming that to be pertinent) by the defect in the indictment, and there are strong general reasons of law and policy for requiring the Government to lay conspiracy indictments under the properly applicable clause.

B. The indictment does not charge petitioners with conduct involving fraud against the United States. Petitioners' union was entitled to compliance status upon the filing of the affidavits whether true or false; the Government did not rely upon their truth in granting or withholding compliance. *Leedom* v. *International Union*, 352 U.S. 145; *Amalgamated Meat Cutters* v. *Board*, 352 U.S. 153. Without such reliance there is no defrauding, and the charge of conspiracy to defraud is not made out.

II.

Section 9(h) of the Taft-Hartley Act is Unconstitutional. A. It is unconstitutional as a bill of attainder under Article I Section 9 of the Constitution. *United States* v. *Archie Brown*, 381 U.S. 437, held Section 504 of the Landrum-Griffin law of 1959 unconstitutional, and Section 9(h) presents no distinct problems. Although the *Brown* case does not explicitly overrule *American Communications Association* v. *Douds*, the later case endorses no distinctions, and the dissenting judges thought it plain that the *Douds* case had been overruled. Section 9(h) falls within the most restricted concepts of attainder, inasmuch as it is made applicable to a named organization. It likewise falls within the broader concepts of attainder adopted in *Cummings* v. *Missouri*, 4 Wall. 277, and *Ex parte Garland*, 4 Wall. 333.

B. Section 9(h) is unconstitutional under the First and Fifth Amendments to the Constitution. *Aptheker* v. *Secretary of State*, 378 U.S. 500, has made it clear that even non-criminal sanctions cannot validly be applied on

the basis of Communist Party membership, absent the factors of knowledge, intent, and activity relied upon in e.g., *Scales* v. *United States*, 367 U.S. 203. These factors were neither charged nor proved in the present case, nor can Section 9(h) be interpreted as embracing these additional factors as necessary elements of the offense here charged. Under the rule of *Shelton* v. *Tucker*, 364 U.S. 479, Section 9(h) sweeps too broadly and must be held unconstitutional.

III.

Petitioners' motions for the production of the grand jury testimony of key prosecution witnesses were erroneously denied. A. There was "particularized need" for the grand jury testimony of the four prosecution witnesses in question under the rule of *Pittsburgh Plate Glass*, 360 U.S. 395. Each was a key witness whose testimony was essential for the government's case. Practically all of their testimony was uncorroborated. Cross-examination revealed that there was serious doubt about the truth of the direct testimony of three of the four. Three of the four had reason for bias and prejudice. Two were accomplices and one had been a paid informer for the FBI. The trial took place in 1963, the witnesses had testified before the grand jury in 1956, and the incriminating events (mostly conversations) had taken place in the period 1949-55, the most damaging in 1949. In view of the lapse of time, scrutiny of the 1956 testimony was highly desirable. Under all these circumstances, the need of petitioners for the grand jury testimony far outweighed the policy of secrecy, none of the reasons for which were at all relevant here.

B. At least, petitioners' alternative motions for *in camera* inspection of the grand jury testimony should have been granted. *Pittsburgh Plate Glass* left open the question of an automatic right to *in camera* inspection.

The Second Circuit has answered that question in the affirmative. That practice is the minimum that fairness requires and conflicts in no way with the secrecy policy. However, even if the trial judge had discretion, the reasons we have advanced for direct production were of course equally applicable to *in camera* inspection.

"C. We suggest that the *Pittsburgh Plate Glass* decision should be reconsidered in the light of its effect over seven years as shown in the lower courts' decisions barring direct production altogether and (except in the Second Circuit) severely limiting *in camera* inspection. By contrast, on the authority of *Pittsburgh Plate Glass* and *Procter & Gamble*, 356 U. S. 677, there has been a growing tendency in civil anti-trust cases to make grand jury testimony (in the antecedent criminal cases) available for discovery before trial. Secrecy is thus less and less a barrier in civil cases, more and more of one in criminal cases. This is an anomaly which should be rectified by liberalization of the practice in criminal cases where secrecy has lost its importance and fairness is all-important.

ARGUMENT

I.

The indictment fails to state the offense of conspiracy to defraud the United States.

At the threshold of this case lies the question of the statutory sufficiency of the indictment. There is no question but that it purports to charge a violation of the fraud clause of the general conspiracy statute (18 U. S. C. 371, *infra*, p. 1a), for that statute is cited in the indictment (R. 1, 4), and the single count alleges (R. 1-2) that "the defendants herein . . . did wilfully, knowingly and unlawfully combine, conspire and agree . . . to defraud the United States and an agency thereof . . ."

This language plainly invokes the second clause of 18 U. S. C. 371, condemning conspiracies "to defraud the United States, or any agency thereof. . . ." The question remains, however, whether or not the ensuing allegations, assuming their truth, make out such a conspiracy, within the principles established in *Bridges* v. *United States*, 346 U. S. 209, *Leedom* v. *International Union of Mine, Mill & Smelter Workers*, 352 U. S. 145, and other pertinent authorities.

A. The Indictment Charges Only a Conspiracy to Commit an Offense of Which Fraud is Not an Element.

It is well established that 18 U. S. C. 371 is a bifurcated statute charging two different types of conspiracies,[8] and that the essential elements of these offenses are different. Therefore, a conspiracy indictment, to be valid, must lay the charge under the proper clause unless it meets the requirements of both.

For example, an indictment laid under the first ("offense") clause must charge that the conspiracy had an object constituting a statutory offense; failing this it must be dismissed for lack of an essential allegation. *United States* v. *Keitel*, 211 U. S. 370. Likewise, an indictment brought under the second ("fraud") clause must specify a fraud on the United States as the conspiracy's object,

[8] The conspiracy provision (now 18 U. S. C. 371) and the so-called continuing offense statute (now 18 U. S. C. 3237) originally comprised the two sentences of Sec. 30 of "An Act to Amend Existing Laws Relating to Internal Revenue, and for Other Purposes", enacted March 2, 1867. See *United States* v. *Gradwell*, 243 U. S. 476, 481. This section was not part of the bill as it passed the House of Representatives; it was added as an amendment in the Senate Committee on Finance, and was adopted by the Senate without discussion on motion of the floor manager, Senator William Pitt Fessenden. See the *Congressional Globe*, 39 Cong. 2d Sess., pp. 1846, 1881, 1920 and 1968. The conspiracy portion became R. S. 5440, and the "continuing" portion R. S. 731.

ings was a punishable offense under 8 U. S. C. 746(a)(1), with which Bridges was charged under the second count of the indictment. The question at issue was whether the indictment was barred by the general three-year statute of limitations, or saved by the Wartime Suspension of Limitations Act (18 U. S. C. 3287) applicable to offenses "involving fraud against the United States . . . whether by conspiracy or not." The Supreme Court held that fraud was not a necessary element of the statutory offense of making false statements in immigration proceedings, and that the second count of the indictment was therefore barred.

The question remained whether the first count, charging conspiracy to defraud, was also barred. There, as here, the government contended that fraud on the United States was charged and practiced, and that conspiracy to defraud was properly charged even though fraud was not a necessary element of the statutory offense. But this Court held that the conspiracy count was also barred, because it actually described only a conspiracy to commit an offense of which fraud was not an element (346 U. S. at 223-24):

> "The Government contends that the General Conspiracy Act under which Count I is laid comprises two classes of conspiracies: (1) 'to commit any offense against the United States' and (2) 'to defraud the United States in any manner or for any purpose.' It urges that the indictment here charges a conspiracy to defraud the United States under the second clause. It suggests that, under that clause, proof of a specific intent to defraud is an essential ingredient of the offense and thus brings Count I within the Suspension Act. The fallacy in that argument is that, while the indictment may be framed in the language of the second clause, both it and the proof to support it rely solely on the fact of a conspiracy to commit the substantive offenses violating § 346(a)(1) or § 346(a)(5) as charged in Counts II and III. Count I actually charges that petitioner conspired to 'defraud the

> United States,' only by causing the commission of the identical offenses charged in Counts II and III. The use in Count I of language copied from the second clause of the conspiracy statute merely cloaks a factual charge of conspiracy to cause, or knowingly to aid, Bridges to make a false statement under oath in his naturalization proceeding, or to obtain by false statements a Certificate of Naturalization to which he was not entitled."

So here, the indictment is "framed in the language of the second clause," but the factual charge is merely one of conspiracy to commit the offense of filing false affidavits—an offense of which fraud is not an element. *United States* v. *McElvain*, 272 U. S. 633; *United States* v. *Lurie*, *supra*, p. 13.

The government attempts (Opp. Br. pp. 7-8) to distinguish the *Bridges* case on the ground that it construed the Wartime Suspension of Limitations Act rather than the conspiracy statute (18 U. S. C. 371). But this is a question-begging play on words, for if the *Bridges* indictment had properly charged a conspiracy to defraud the United States, the Suspension Act would have been applicable, and the indictment would not have been barred by limitations. Indeed it was in an effort to escape the limitations bar that the government invoked the fraud clause of 18 U. S. C. 371 but, as this Court held, the "fraud" language was a mere cloak.

No doubt the motivation is the same in the present case. The bulk of the government's evidence germane to the conspiracy as charged related to the affidavits filed by two of the petitioners (Travis and Wilson)[12] in 1949, seven years before the indictment was brought. Whether the three-year statute of limitations in effect in 1949 or the five-year statute enacted in 1954 be applicable, prosecu-

[12] The defendant Van Camp, acquitted at the second trial, filed only one affidavit, and that was in 1949.

tions for false filings based on these 1949 affidavits were barred before 1956, and this Court said in the *Bridges* case (346 U. S. at 222) that: "A charge of conspiracy to commit a certain substantive offense is not entitled to a longer statute of limitations than the charge of committing the offense itself."

But whether or not the Suspension Act or any other limitations question be involved, the indictment must be laid under the clause of 18 U. S. C. 371 that fits the actual charge. The prejudice that may be consequent on looseness is apparent in this very case. Since fraud is an essential element of the offense under the fraud clause,[13] the jury must of course be instructed that they cannot convict unless they find that the defendant(s) intended to defraud the United States.[14] Yet here the trial court failed to charge fraud as an essential element, despite the defendants' explicit request (R. 351).

The distinction between the fraud and offense clauses has other practical consequences, such as in the matter of double jeopardy and sentencing. Many violations of 18 U. S. C. 1001 are relatively innocuous, e.g., *United States* v. *Tommasello*, 160 F. 2d 348 (C. C. A. 2, 1947); *Walker* v. *United States*, 192 F. 2d 47 (C. A. 10, 1951). On the other hand, conspiracy to defraud is regarded as a heinous

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[13] We do not understand that the Government contests this proposition and, indeed, it so argued in the *Bridges* case, with the apparent approval of this Court (346 U. S. at 223, quoted *supra*, pp. 14-15). See also *Salas* v. *United States*, 234 Fed. 842, 845 (C. C. A. 2) ("The statute clearly contemplates that the parties shall intend to defraud the United States. . . ."); *Bergen* v. *United States*, 145 F. 2d 181, 187 (C. C. A. 8).

[14] See, *e.g.*, the charges in *United States* v. *Belisle*, 107 F. Supp. 283, 287 (W. D. Wash. 1951); *United States* v. *Bayer*, 331 U. S. 532 (Trans. of Rec. 1138, 1160-61); *United States* v. *Walsh*, Fed. Cas. No. 16,636 (C. C. E. D. Mo. 1878).

offense, and this estimate may well lead to a heavier sentence. See *United States* v. *Belisle*, 107 F. Supp. 283, 286 (W. D. Wash. 1951).

B. The Indictment Fails to Charge Conduct Which in Fact Involves Fraud.

Quite independently of the foregoing, the indictment is defective because the conduct of which petitioners are accused did not in fact involve fraud. In this respect the case is even clearer than the *Bridges* case, for there it was charged that fraud was present in fact (i.e., in obtaining naturalization by means of a false statement) even though the relevant section of the Nationality Act applied to all false statements, whether or not fraudulent (346 U. S. at 212-13). But here the motives and actions of the accused, as charged in the indictment, do not establish either an intent to defraud the United States, or that the United States was in fact defrauded.

To be sure, it has long been settled that the fraud need not be pecuniary, or even related to property, in order to be punishable under 18 U. S. C. 371. *United States* v. *Keitel*, 211 U. S. 370; *Glasser* v. *United States*, 315 U. S. 60. Corruption or obstruction of government functions of any kind will lay the basis for a prosecution, but these consequences must be attributable to fraud. In other words, there must be an intent that the government rely on representation, and take or refrain from action because it is misled by the fraudulent conduct. As this Court ruled in *Hammerschmidt* v. *United States*, 265 U. S. 182, 188:

> "It is not necessary that the government shall be subjected to property or pecuniary loss by the fraud, but only that its legitimate official action and purpose shall be defeated by misrepresentation, chicane or the overreaching of those charged with carrying out the governmental intention."

In the present case, the Labor Board did not rely on the truthfulness of the non-Communist affidavits and, assuming they were false, that falsity did not influence or induce the Board to issue certificates of compliance to Mine-Mill, nor did it affect the Board's action in any other way. It was the fact of filing, and not the truth or falsity of the affidavit filed, which was the basis of compliance and Board action. *Leedom* v. *International Union of Mine, Mill and Smelter Workers*, 352 U. S. 145; *Amalgamated Meat Cutters* v. *National Labor Relations Board*, 352 U. S. 153.

The policy of the Taft-Hartley Law was that if a union officer failed to file a non-Communist affidavit, the union must either forego the benefits of compliance or get rid of the officer and select a new one who would file. But if all the officers had filed such affidavits, the union was entitled to compliance status whether the affidavits were true or false. The Board relied on the filing (hence, presumably, would have been "defrauded" by *forged* affidavits), but not on the truth of what was filed; prosecution of the union officer under 18 U. S. C. 1001 was the only sanction for false filing, as was held in the *Leedom* and *Meat Cutters* cases, *supra*.

This case, therefore, is quite unlike the many others in which it has been held that a false document or statement works a fraud on the government by corrupting or obstructing government functions. In an immigration case, for example, the government grants entry on the basis that a representation of marriage is true. *Lutwak* v. *United States*, 344 U. S. 604. In other cases the government may convey public lands, or issue passports, or rest content with taxes as paid, or do or refrain from doing a vast variety of things in reliance on the truthfulness of a representation of some kind. But the statutory policy involved in the present case was to grant compliance to a union whose officers denied Communist ties, whether those

denials were true or false. If false, it may be true, as the trial judge wrote (R. 15-16), that a "false key" was used to obtain the benefits of compliance. But for that purpose the government was as content with a false as with a true key; it gave the union its certificate and pursued the affiant under 18 U. S. C. 1001. As the Court said in the *Leedom* case (352 U. S. at 151), the policy of the statute was to penalize the guilty officers, not the members of the union for conduct of which they were ignorant.

It is to be noted that, in the only other conspiracy case based on Section 9(h) of the Taft-Hartley Law, the Government laid the indictment under the offense clause of 18 U. S. C. 371, thus omitting any charge of fraud. *West v. United States*, 274 F. 2d 885 (C. A. 6), cert. den. 365 U. S. 819. The *West* indictment (Jan. 23, 1957) was filed *after* the *Leedom* and *Meat Cutters* decisions (Dec. 10, 1956); the present indictment antedated them (Nov. 16, 1956). It is a permissible inference that the Government recognized the implications of those decisions, and shifted to the offense charge in order to avoid (in part) the disabilities to which the present indictment is subject.

Those disabilities are fatal, and accordingly these judgments should be reversed and the cases remanded with instructions to dismiss the indictments for failure to state an offense.

II.

Section 9(h) of the Taft-Hartley Act is unconstitutional.

Both on its face and as applied to the petitioners, Section 9(h) of the Taft-Hartley Act is unconstitutional under the First and Fifth Amendments to the Constitution, and as a bill of attainder under Article I Section 9 of the Constitution. As indicated in our petition for

certiorari (pp. 11-12),[15] the two recent decisions of this Court that were invoked as warranting review of the constitutional issues are *United States* v. *Archie Brown*, 381 U. S. 347, and *Aptheker* v. *Secretary of State*, 378 U. S. 500.

A. Section 9(h) is Unconstitutional as a Bill of Attainder.

The scope of the prohibition against bills of attainder in Article I Section 9 of the Constitution has been so recently and exhaustively analyzed by this Court in the *Archie Brown* case, *supra*, that extensive discussion herein would serve no useful purpose. The only question is whether Section 9(h) of the Taft-Hartley law, here at stake, differs in any constitutionally significant way from its successor statute, Section 504 of the Labor Management Reporting & Disclosure Act of 1959 (29 U. S. C. 504), which was held unconstitutional as a bill of attainder in the *Archie Brown* case.

A comparison of the two statutes[16] will show that Section 504 makes it a criminal offense for anyone who

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[15] In opposing the petition for certiorari, the Government contended (Opp. Br., pp. 10-13) that "the validity of Section 9(h) is not a proper issue in this case", relying chiefly on *United States* v. *Kapp*, 302 U. S. 214 and *Kay* v. *United States*, 303 U. S. 1. In their reply to the Government's opposition (at pp. 3-4), petitioners pointed out the irrelevance of the *Kapp* and *Kay* cases (in both of which the defendants made false statements in order to obtain financial benefits from the Government) and the dangers that would flow from applying them in a case like the present one, in which petitioners are merely exercising rights which would be open to them in the absence of the unconstitutional statute under which the allegedly false statements are required to be made. We do not believe that the point is substantial, and in any event it appears to be foreclosed by the Court's order granting certiorari. Should the Government continue to press it, we will, in reply, deal with the question to whatever extent may then be necessary.

[16] Both are set forth in the Appendix, *infra*, pp. 2a-3a.

is or has within the preceding five years been "a member of the Communist Party" to serve as an officer of "any labor organization" while Section 9(h) barred compliance status before the National Labor Relations Board to labor organizations unless their officers had filed affidavits denying membership in or affiliation with the Communist Party. In *American Communications Assn.* v. *Douds*, 339 U. S. 382, this Court upheld Section 9(h) against constitutional challenges, including one based on the bill of attainder clause, 339 U. S. at 413-15.

The Court's opinion in the *Archie Brown* case does not explicitly overrule the *Douds* case, but it does explicitly refuse to find that the two cases can be satisfactorily distinguished. To say, as the Court's opinion in the *Archie Brown* case does (381 U. S. at 457), that "[t]his case is not necessarily controlled by Douds" is certainly to underline a refusal to reaffirm the *Douds* case by endorsing a distinction.

The difference indicated following this observation (381 U. S. at 457-58) is that the restriction in Section 9(h) applies only to present Communist membership, whereas Section 504 also covers a five-year period after termination of such membership. In the *Douds* case, the Court's opinion (339 U. S. at 413-14) relied on Section 9(h)'s limitation to present membership to show that, since its restrictions could be escaped by resigning from the Party, the purpose was "to prevent future action rather than to punish past action". However, the *Archie Brown* opinion, after stating these differences, proceeds to pronounce them insufficient as a basis of distinction; "punishment" in a bill of attainder sense includes not only retributive punishment for the past, but deterrent and preventive punishment to protect the future (381 U. S. at 458-60), and "inescapability" is not an essential feature of attainder (381 U. S. at 457, n. 32), as had been pointed out in the Court's first opinion dealing with attainder. *Cummings* v. *Missouri*, 4 Wall. 277, 324.

At two separate points, the Court's opinion in the *Archie Brown* case criticizes the conceptual basis and reasoning of the *Douds* opinion on the bill of attainder point.[17] The four dissenting members of the Court were of the opinion that, by virtue of the *Brown* decision (381 U. S. at 464-65): "*American Communications Association* v. *Douds* . . . , which upheld the predecessor statute to § 504 is obviously overruled."

Under both the majority and minority opinion in the *Archie Brown* case, accordingly, there is no basis for distinguishing the present case from the *Brown* case, and under its authority Section 9(h) of the Taft-Hartley law must be held unconstitutional as a bill of attainder. Furthermore, apart from what is said in the *Brown* opinions, neither history, prior authority, or logic offer any sufficient basis for distinguishing the two cases.

Prior to the adoption of the Constitution, most (but not all) bills of attainder were directed against one or more named individuals.[18] As an original proposition, it might have been contended that the proscription of Article I Section 9 (and, presumably, of the parallel prohibi-

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[17] After stating the view that the bill of attainder proscription is an "implementation of the separation of powers" (381 U. S. at 442) and an important safeguard against legislative adjudication, the Court observed (381 U. S. at 447): "It is in this spirit that the Bill of Attainder clause was consistently interpreted by this Court —until the decision in *American Communications Ass'n.* v. *Douds* . . . which we shall consider hereafter." At a later point, in discussing the question whether punishment for past actions rather than as a preventive for the future is an essential element of attainder, the Court declared (381 U. S. at 460): "We think the Court in *Douds* misread *United States* v. *Lovett* when it suggested, 339 U. S. at 413 . . . that the case could be distinguished [*i.e.*, from *Douds*] on the ground that the sanction there imposed [*i.e.*, in *Lovett*] was levied for purely retributive reasons."

[18] The pre-Constitutional history of bills of attainder is set out so fully in the Court's opinion in the *Brown* case that recapitulation herein is quite unnecessary. Additional historical information is to be found in Note 72 Yale L. J. 330 (1962), and in the brief for the petitioners in *United States* v. *Lovett*, 328 U. S. 303, Nos. 809-11, October term 1945, pp. 112-138.

tion in Section 10) was confined to such "naming" enactments. But in the very first cases before this Court in which the problem arose, and although that very argument was made, the bill of attainder proscription was held to apply to acts which named no individual or group, but which called for qualifying oaths of non-involvement with the Confederacy as a condition of voting, office-holding and practicing various professions. *Cummings* v. *Missouri*, 4 Wall. 277, 279-81, 294, 296-97, 323-24; *Ex parte Garland*, 4 Wall. 333, 334-35.[19]

The attainder problems presented by "naming" laws on the one hand and "non-naming" group enactments on the other are overlapping but not congruent. We respectfully urge that both Section 9(h) and Section 504 fall in the overlapping area and that they are not significantly different under any acceptable analysis.

To begin with, both are "naming" enactments, and thus constitutionally vulnerable without resort to the broader concepts adopted in the *Cummings* and *Garland* cases. True, they do not name individuals (as did the statute denounced as an attainder in the *Lovett* case, *supra*), but they both apply their respective sanctions to the members of an organization specified by name, the Communist Party. Thus the law is phrased in special and individually designatory rather than general terms; the Communist Party is its subject regardless of how the characteristics of that organization might change, while no other group is covered whether or not it displays whatever characteristics might be thought similar to those of the Communist Party.[20]

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[19] The four dissenting judges in these cases would have restricted the constitutional proscription to "naming" enactments, 4 Wall. at 389.

[20] To venture an analogy, Congress might well require that officers of the armed services state their willingness to bear arms in national defense. Congress might also "find" that members of the Society of Friends are unwilling to do that. Nevertheless, a bill disqualifying as officers all "Quakers" rather than "those unwilling to bear arms" would be a bill of attainder.

As the *Archie Brown* opinion points out (381 U. S. at 450-52), the registration provisions of the Subversive Activities Control Act of 1950 (50 U. S. C. 781 *et seq.*) were upheld, against challenge as attainder, precisely on the ground that the law did *not* specify any organization by name, but by defined charactertistics to be applied by administrative and judicial determination. *Communist Party* v. *Subversive Activities Control Board*, 367 U. S. 1, 82-88. It is true that the Communist Party was designated by name in *Flemming* v. *Nestor*, 363 U. S. 603, but there the law was upheld against attainder challenge on the ground that (363 U. S. at 617) the "sanction is a mere denial of a non-contractual benefit" (old-age benefit payments), and therefore imposed no "punishment".[21] Whatever the continued vitality of that conclusion, it can have no application to the present case, in which unions were deprived under Section 9(h) of rights to which they would otherwise be clearly entitled unless their officers disavowed Communist Party membership.[22]

"Non-naming" statutes, such as those invalidated in the *Cummings* and *Garland* cases, *supra*, present additional problems of analysis. Statutes imposing penalties, restrictions, and qualifications of various sorts on groups of persons designated not by name but by general characteristics are an ancient and accepted feature of the statutory scene.

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[21] But *cf. Cummings* v. *Missouri*, 4 Wall. at 320: "The deprivation of any rights, civil or political, previously enjoyed, may be punishment, the circumstances attending and the cause of the deprivation determining this fact."

[22] See the *Douds* case, 339 U. S. at 389-90: "It cannot be denied that the practical effect of denial of access to the Board and the denial of a place on the ballot in representation proceedings is not merely to withhold benefits granted by the Government but to impose upon non-complying unions a number of restrictions which would not exist if the Board had not been established. . . . The fact is that § 9(h) may well make it difficult for unions to remain effective if their officers do not sign the affidavits."

In the *Cummings* and *Garland* cases the sanctions were applied to those (determined by negative oath) who had given aid, comfort, or even sympathy to those in armed hostility to the United States, including specifically but not exclusively the Confederate cause. By what principle is such a law to be distinguished from those many, of unquestioned validity, which impose qualifications for office or professional practice, or lay down other restrictions preventive of "conflict of interest"?[28]

It has been said (as in *Flemming* v. *Nestor, supra,* and in the dissenting opinion in the *Brown* case, 381 U. S. at 462) that the issue turns on inquiring whether the purpose of the restriction is "punitive" or "regulatory". Petitioners suggest, with all respect, that these adjectives may be more useful as statements of conclusions reached than as tools for reaching them. Some statutes imposing restrictions may be purely "punitive" and others purely "regulatory", but often they are both, and these are the cases which the courts are most likely to confront. *Cf. Trop* v. *Dulles,* 356 U. S. 86, 96: "The Court has recognized that any statute decreeing some adversity as a conse-

[28] These problems of analysis are reflected in the extensive discussion in both the majority and minority opinions in the *Archie Brown* case (381 U. S. at 453-56 and 465-69) of *Board of Governors* v. *Agnew,* 329 U. S. 441, involving Section 32 of the Banking Act of 1933 (12 U. S. C. 78 (1964 ed.)), which prohibits underwriters from serving as directors of Federal Reserve member banks. The dissenting justices thought the majority made "no meaningful distinction" between Section 32 and Section 504 of the Labor Management Act (381 U. S. at 466), and themselves encountered the problem of distinguishing Section 32 from the statute invalidated in the *Cummings* case (381 U. S. at 476). We suggest that in Section 32 Congress sought to prevent situations of conflict of interest, irrespective of the propensities of individual underwriters; whereas in Section 504 and Section 9(h), Congressional concern was directly focused on particular propensities thought to arise from Party affiliation.

quence of certain misconduct may have both a penal and a non-penal effect."

The problem has been described as not unlike those often presented under the due process and equal protection clauses. Do the group specified and the adversity imposed bear a reasonable relation to a lawful legislative purpose? Although he wrote two years before the adoption of the 14th Amendment, Mr. Justice Field saw the matter in just those terms, the first time it arose in an attainder context, in *Cummings* v. *Missouri*, 4 Wall. at 319-20:

> "Qualifications relate to the fitness or capacity of the party for a particular pursuit or profession . . . It is evident from the nature of the pursuits and professions of the parties, placed under disabilities by the constitution of Missouri, that many of the acts, from the taint of which they must purge themselves, have no possible relation to their fitness for those pursuits and professions . . . The oath could not, therefore, have been required as a means of ascertaining whether parties were qualified or not for their respective callings or the trusts with which they were charged. It was required in order to reach the person, not the calling."

This passage of the *Cummings* opinion, and the test of "reasonable relation" which it embodies, were relied on by the Court in subsequent cases to distinguish and sustain, against attainder challenge, statutes specifying qualifications for the practice of medicine. *Dent* v. *West Virginia*, 129 U.S. 114, 126; *Hawker* v. *New York*, 170 U.S. 189. It is probably too inclusive a test for attainder in its traditional guise,[24] and it cannot be applied (at

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[24] Examples of enactments which impose adverse consequences on a group defined in general but unreasonable terms are not difficult to find. See, *e.g.*, *Skinner* v. *Oklahoma*, 316 U. S. 535; *Gangemi* v. Rosengard, 44 N. J. 166 (1965). In neither case would the adversity

least without careful qualification) to bills that specify individuals or organizations by name.[25] Nevertheless, there is an obvious and close relation between the vice of attainder and of unreasonable and oppressive classifications that violate the guaranty of equal protection of the laws, as was clearly noticed in the opinion of the late Mr. Justice Frankfurter in the *Lovett* case, 328 U.S. at 326-28; see also the dissenting opinion of Mr. Justice White in the *Brown* case, 381 U.S. at 476;[26] *Hurtado* v. *California*, 110 U.S. 516, 535-36.

Of course, there is room for sharp division of opinion whether or not the defined group and the sanction bear

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be commonly described as an "attainder", though the principles of the *Cummings* and *Garland* cases would appear to be applicable. Perhaps if the *Cummings* and *Garland* cases had been decided after judicial development of due process and equal protection, the Court would have utilized those grounds in addition to attainder.

[25] See Note 72 Yale L. J. 330, 349-52 (1962), in which criticism of the "reasonable relation" test is based on the observation that a legislature could "reasonably" conclude that a named person or member of a given organization (*e.g.*, the Ku Klux Klan) have certain disqualifying characteristics. However, under the principle that legislation should be general (which lies at the root of the proscription of attainders) a legislature cannot properly "know" or "find" that a named individual or organization is "better" or "worse" than any other, and accordingly any bill classifying by name is unreasonable by definition. Cf., *Hurtado* v. *California*, 110 U. S. 516, 535-36.

[26] The affinity between the vice of attainder and unequal protection does not, historically speaking, make surplusage of the attainder proscriptions in Sections 9 and 10 of Article I. Until 1868 and the Fourteenth Amendment, the states (Section 10) were not bound by either due process or equal protection and, in view of English and colonial practice, it might well have been held, in the absence of specific prohibition, that bills of attainder were not prohibited by the due process clause of the Fifth Amendment. The federal government is not bound by the equal protection clause of the Fourteenth Amendment, but it is accepted that the due process clause of the Fifth Amendment embodies the elements of equal protection. *Bolling* v. *Sharpe*, 347 U. S. 497, 499; *Hirabayashi* v. *United States*, 320 U. S. 81, 100; *cf. Hurtado* v. *California*, 110 U. S. 516, 535-36.

reasonable relation to a valid Congressional purpose. In the *Brown* case, a majority of the Court found no sufficient "demonstrable relationship" (381 U.S. at 456) between bare Communist Party membership and the prevention of "political strikes"; the minority thought otherwise (381 U.S. at 470-72 and 478),[27] as did the majority in the *Douds* case (339 U.S. at 391). The position of the majority in the *Brown* case is well-grounded in history, for it was political groups that "were the targets of the overwhelming majority of English and early American bills of attainder" (381 U.S. at 453). *The Supreme Court, 1964 Term*, 79 Harv. L. R. 56, 123 (1965).

If the standard of "reasonable relation" be thought relevant to the attainder issue, accordingly, the present case is plainly governed by the *Archie Brown* case, because the political group against whom the sanctions are directed (*i.e.*, members of the Communist Party) is the same in Section 9(h) as in Section 504. But, as indicated in the earlier part of this point (*supra*, p. 22), the problem of classification need not be reached, for Section 9(h), like Section 504, is directed against the members of a particular organization specified by name, and is there-

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[27] The minority in the *Brown* case appear (381 U. S. at 470 and 478) to base their conclusion (at least in part) on the 1956 findings with respect to the Communist Party in *Communist Party* v. *Subversive Activities Control Board*, 367 U. S. 1—findings which were of course not available in 1947 when Congress enacted Section 9(h) of the Taft-Hartley law. But even if the 1956 findings could be used for a sort of retrospective validation of Section 9(h)—a notion dubious enough in view of the circumstance that petitioners in the present case were indicted in 1956—we do not think that the SACB findings are of any assistance to the Government in the present case. *Cf.* the decision of this Court in 1957 concerning the Communist Party, based on the record in *Yates* v. *United States*, 354 U. S. 298, at 329-30, and the observation in *Noto* v. *United States*, 367 U. S. 290, at 299; "It need hardly be said that it is upon the particular evidence in a particular record that a particular defendant must be judged and not upon the evidence in some other record or upon what may be supposed to be the tenets of the Communist Party."

fore invalid as a bill of attainder under the traditional concepts antedating the *Cummings* and *Garland* cases.

For all the foregoing reasons, Section 9(h) must be held invalid as a bill of attainder, proscribed by Section 9 of Article I of the Constitution.

B. Section 9(h) is Unconstitutional under the First and Fifth Amendments.

Archie Brown challenged Section 504 of the Landrum-Griffin law not only as a bill of attainder, but also as a violation of both the First Amendment and the due process clause of the Fifth Amendment,[28] and it was on these latter grounds that he prevailed in the Court of Appeals for the Ninth Circuit, sitting *en banc*. *Brown* v. *United States*, 334 F. 2d 488.[29] On review here, the Court rested its decision on the bill of attainder clause alone, and neither the majority nor the minority Justices expressed any opinion on the other constitutional contentions.[30]

Section 9(h) of the Taft-Hartley law was sustained against a First Amendment challenge in the *Douds* case. To that extent, accordingly, petitioners here are asking the Court to overrule the *Douds* case, on substantially the grounds relied on by the Court of Appeals in the *Archie Brown* case. It is true, of course, that the Court of Appeals was bound by and therefore distinguished the *Douds* case from the one before it (334 F. 2d at 493-95), pointing

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[28] Indeed both in the lower courts and in this Court, Brown's principal contentions were laid under the First and Fifth Amendments, rather than the prohibition of attainders.

[29] Five of the eight judges concurred in Judge Merrill's opinion for the court. Judge Hamley would have reversed the conviction on procedural grounds without reaching the constitutional questions, and the remaining two judges, dissenting, would have sustained the statute as constitutional.

[30] 381 U. S. at 440 and 478.

to the differences in scope and impact between Section 9(h) and Section 504. We respectfully urge, however, that the distinctions so relied on are plainly insufficient in the light of recent decisions by this Court, including particularly *Aptheker* v. *Secretary of State*, 378 U. S. 500.

In approaching the constitutional questions now stirred, there are two matters which, we believe, are beyond contrary contention and are basic to the ensuing analysis.

(1) The case was tried and adjudicated below on the assumption that mere membership in the Communist Party, irrespective of elements such as knowledge, intent, or activity, was all that was required to bring Section 9(h) into operation, and to provide the unlawful element in the conspiracy charged in this indictment. The indictment alleges no more; no more was proved or offered to be proved; no more was required in the charge to the jury; no more has been invoked to support the judgments of conviction.[31]

(2) Section 9(h) is not susceptible to any such narrowing construction as this Court has placed on the provisions of the Smith Act, especially the so-called "membership clause" thereof. *Cf. Scales* v. *United States*, 367 U. S. 203. The structure and *modus operandi* of Section 9(h) and its purpose were as described by this Court in the *Douds* case, 339 U. S. at 387-89, 416-22 (Frankfurter, *J.* concurring), 422-35 (Jackson, *J.* concurring). Throughout the twelve years of its life, Section 9(h) was administered and judicially enforced on the basis that it applied to all members of the Communist Party, of whatever shade

[31] Consequently, no such issue is presented here as the one that divided the Court in the *Aptheker* case, *supra*, where the three dissenting Justices thought (378 U. S. at 521-25 and 529) that Section 6 of the Subversive Activities Control Act could constitutionally be applied to the individual petitioners, regarded (378 U. S. at 525) as "top Party functionaries".

of opinion or degree of activity. So too, all the reasons which in the *Aptheker* case restrained this Court from giving a restricted interpretation to Section 6 of the Subversive Activities Control Act (378 U. S. at 515-17) are equally applicable to Section 9(h).[32]

The constitutional vice now under discussion may be described both in First Amendment terms, as an unwarranted restriction on the freedom of speech and association of the petitioners as union officers and employees, and in Fifth Amendment (due process) terms as an unwarranted limitation on the petitioners' rights to engage in union activities, and vote for and be elected as union officers. Although these contentions are conceptually distinct, we do not think it necessary to discuss them separately,[33] for the considerations governing their applicability are closely interrelated, as the opinions in the *Aptheker* case demonstrate.

That case involved the validity of Section 6 of the Subversive Activities Control Act of 1950 (50 U. S. C. 785), which made it unlawful for a member of a "Communist organization" subject to a registration order to apply for, renew, or use a passport. Appellants there challenged the statute under the First and Fifth Amendments and the attainder clause. Writing for five members of the Court, Mr. Justice Goldberg held it an unconstitutional restriction on the appellants' "right to travel abroad", which (under the holding of *Kent* v. *Dulles*, 357 U. S. 116) was an important part of the "liberty" guaranteed in the due process clause. Insofar as the government sought to support the

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[32] The Court of Appeals in the *Archie Brown* case considered and rejected the "narrow interpretation" technique (334 F. 2d at 497) for Section 504, and the reasons relied on there are also precisely applicable to Section 9(h).

[33] Insofar as the attainder argument involves considerations of equal protection, we also rely on the due process clause in its equal protection guise, as indicated *supra*, pp. 26-27.

statute on the ground that appellants could "recapture" their freedom to travel by resigning from the organization (the Communist Party), the Court relied on the First Amendment, declaring (378 U. S. at 507):

> "Since freedom of association is itself guaranteed in the First Amendment [citing eight prior decisions], restrictions imposed upon the right to travel cannot be dismissed by asserting that the right to travel could be fully exercised if the individual would first yield up his membership in a given association."

Concurring in the Court's opinion, Mr. Justice Douglas stressed the close relation between the right to travel and First Amendment guarantees (378 U. S. at 520): "Freedom of movement is kin to the right of assembly and to the right of association." Mr. Justice Black, however, did not concur in the Court's opinion because (378 U. S. at 518-19) he could find no right to "travel abroad at will" in the due process clause, and preferred to ground his own opinion on the First Amendment, the bill of attainder clause, and the procedural guarantees of the Fourth, Fifth, and Sixth Amendments.[34]

In holding the statute there in question invalid, Mr. Justice Goldberg was chiefly moved by its excessive breadth (378 U. S. at 505), and particularly by its disregard of the appellants' state of mind and degree of participation (378 U. S. at 510-11):

> "The section also [35] applies whether or not one knows or believes that he is associated with an organization operating to further aims of the world

[34] Dissenting, Mr. Justice Clark and Mr. Justice Harlan thought (378 U. S. at 525-26) that "the restriction is reasonably related to the national security." Together with Mr. Justice White, they also thought it could be validly applied to the appellants if not to (370 U. S. at 525) "unknowing members".

[35] The "also" refers to an additional factor previously referred to, irrelevant to the present case.

> Communist movement. . . . The provision therefore sweeps within its prohibition both knowing and unknowing members. . . .
>
> "Section 6 also renders irrelevant the member's degree of activity in the organization and his commitment to its purpose. These factors, like knowledge, would bear on the likelihood that travel by such a person would be attended by the type of activity which Congress ought to control. . . . Section 6, however, establishes an irrebuttable presumption that individuals who are members of the specified organizations will, if given passports, engage in activities inimical to the security of the United States."

The constitutional analysis in the *Aptheker* case closely parallels that in the opinion previously rendered by the Court of Appeals in the *Brown* case.[36] That opinion did, indeed, distinguish the *Douds case* (334 F. 2d at 493-95) on the ground that, unlike Section 9(h) of the Taft-Hartley law, Section 504 involves criminal sanctions for simultaneous union office-holding and Communist Party membership. But that distinction, whatever its merit when put forward, lost its force with the rendition of this Court's judgment in the *Aptheker* case which, like the present one, involved a non-criminal sanction, i.e., loss of passport privileges.

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[36] The *Aptheker* decision was handed down on June 22, 1964; the Court of Appeals' *Brown* decision was three days earlier. Writing for the majority, Judge Merrill, relying on *Scales* v. *United States*, 367 U. S. 203, and *Noto* v. *United States*, 367 U. S. 290, ruled (334 F. 2d at 493) that a criminal conviction based on Communist Party membership could "escape First Amendment condemnation" only if "defendant was an 'active' member of such an organization with a specific intent to further such unlawful purposes." Again relying on the *Scales* case, Judge Merrill also declared (334 F. 2d at 495-96) that, under the due process clause, criminal guilt can not be imputed to Communist Party members, absent "specific intent to use union office to interrupt interstate commerce" or active and purposeful participation "in furtherance of illegal party activities aimed at overthrow of the Government."

There is no sufficient basis for distinguishing the *Aptheker* case from the present one. If in the former the "right to travel abroad" is a liberty guaranteed by the due process clause, so also is the right to engage in other normal activities of life, including union affairs and office-holding. The *Douds* case itself (339 U. S. at 389-90) recognizes that Section 9(h) imposed on these activities "restrictions which would not exist if the [National Labor Relations] Board had not been created." The crucial missing elements noted by the Court in the *Aptheker* case (378 U. S. at 509-11)—knowledge of Communist aims, intent to promote those aims or engage in feared pursuits, active participation in Party affairs—are equally lacking in the present situation. In the context of the Bill of Rights, as this Court declared in *Wieman* v. *Updegraff*, 344 U. S. 183, 191: "Indiscriminate classification of innocent with knowing activity must fall as an assertion of arbitrary power." *Cf. Schneiderman* v. *United States*, 320 U. S. 118, 136; *Schware* v. *Board of Bar Examiners*, 353 U. S. 232, 246.

Nor can there be any doubt that the First as well as the Fifth Amendment protects the petitioners' union activities. *Cf. Thomas* v. *Collins*, 323 U. S. 516, 537-38. As the Court stated in *N.A.A.C.P.* v. *Button*, 371 U. S. 415, at 430:

> "We need not, in order to find constitutional protection for the kind of cooperative, organizational activity disclosed by this record . . . subsume such activity under a narrow, literal conception of freedom of speech, petition or assembly. For there is no longer any doubt that the First and Fourteenth Amendments protect certain forms of orderly group activity. Thus we have affirmed the right 'to engage in association for the advancement of ideas and beliefs.' *N.A.A.C.P.* v. *Alabama, supra*, at 460. We have deemed privileged, under certain circumstances, the efforts of a union official to organize workers. *Thomas* v. *Collins, supra*. . . ."

Since the rights here in question are constitutionally protected, as indeed was recognized in the *Douds* case (339 U. S. at 393), the question is whether their infringement by Section 9(h) can be upheld on the basis of a "clear and present danger" or other applicable "balancing" test, as was done in, *e.g.*, *Dennis* v. *United States*, 341 U. S. 494, and in the *Douds* case itself (339 U. S. at 400, 412). And on this point, as the Court noted in the *Aptheker* case (378 U. S. at 508), the principle of "narrow achievement" must also be applied. In *Shelton* v. *Tucker*, 364 U. S. 479, Mr. Justice Stewart (speaking for the Court) wrote (at 488):

> "In a series of decisions this Court has held that, even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgement must be viewed in the light of less drastic means for achieving the same basic purpose."

The same considerations that led this Court in the *Aptheker* case to find that the statute there in question (378 U. S. at 514) "sweeps too widely and too indiscriminately across the liberty guaranteed in the Fifth Amendment" are equally applicable here. The decision in the *Douds* case cannot survive the reasoning and result of the *Aptheker* case, and must be regarded as no longer controlling.

Accordingly, the present judgment must be reversed, should these questions be reached, on the ground that Section 9(h) is unconstitutional under the First and Fifth Amendments to the Constitution.

III.

Petitioners' motions for the production of the grand jury testimony of key prosecution witnesses were erroneously denied.

Four of the government's five principal witnesses—Locke, Fikes, Gardner and Mason—had testified in 1956 before the grand jury which returned the indictment. (Lawrence, the fifth, had not so testified). At the conclusion of the direct examination of Locke, Fikes and Gardner, and again after the cross-examination of Fikes and Gardner, the defense moved for the production of their grand jury testimony directly to it or, in the alternative, to the court for *in camera* inspection and then to the defense if the examination disclosed inconsistencies with the trial testimony of the witness. The trial judge denied all of these motions on the ground that no "particularized need" had been shown (R. 64-66; 256; 309-11; 312; 346 F. 2d 10, 17).

Mason had testified on the first trial, but died before the second, *supra*, p. 6. In his case, the trial judge had denied similar motions addressed to his grand jury testimony on the first trial (R. 176). On the second trial, the defense objected to the admission of his first trial testimony on the ground that the denial of the motions on the first trial had deprived the defense of its full right of cross-examination (R. 89-91). The objection was overruled (R. 91). Since Mason was no longer available for cross-examination on the second trial, his first trial testimony should not have been received if the denial of the motions for his grand jury testimony on the first trial was erroneous.

The opinion below ignored the motions for production of the grand jury testimony directly to the defense. Although the court noted that "it would have been safer to

have inspected the grand jury testimony," it nevertheless affirmed the denial of *in camera* inspection, stating that "inasmuch as the witnesses were thoroughly and competently cross-examined on numerous other relevant judicial and extra-judicial statements without manifest inconsistency, it is safe to assume that the grand jury proceedings would not have disclosed anything of impeaching significance." (R. 396; 346 F. 2d 10, 18).

The ruling below is a misapplication of *Pittsburgh Plate Glass* v. *United States*, 360 U. S. 395. There, the Court stated (at 400) that the defense is entitled to inspect the relevant grand jury testimony of a prosecution witness if it shows "that a 'particularized need' exists for the minutes which outweighs the policy of secrecy."[37] The Court (at 401) expressly reserved the question as to whether a trial judge is "absolutely required" to honor a defense request that he examine the grand jury testimony of a prosecution witness and make it available to the defense if it is inconsistent with the trial testimony.

The ruling below, contrary to *Pittsburgh Plate Glass*, assumes that the production of grand jury testimony directly to the defense is never permissible,[38] and makes its own version of "particularized need" a prerequisite to *in camera* inspection.

In what follows, it is shown that (1) petitioners made the showing of "particularized need" required by *Pittsburgh Plate Glass* and hence were entitled to the grand jury testimony of the four witnesses, and (2) in any event, petitioners' alternative motions for *in camera* inspection were erroneously denied. Finally, it is urged that the

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[37] The four dissenting Justices believed that the defense has an absolute right to the testimony and that no such showing is required.

[38] In accord with the court's earlier decisions in *Travis* v. *United States*, 269 F. 2d 928, 945-46, rev'd on other grounds, 364 U. S. 631; *Bary* v. *United States*, 292 F. 2d 53, 56.

"particularized need" requirement of *Pittsburgh Plate Glass* should be reconsidered in the light of the experience since it was enunciated.

A. Petitioners made the showing of "particularized need" required for the production of grand jury testimony directly to the defense.

Pittsburgh Plate Glass furnishes no specifics for the showing of "particularized need" which entitles the defense to have the grand jury testimony of a prosecution witness.[39] Several guidelines appear from the opinion, however.

We are told (at 400-01) that a showing of contradiction between the trial and grand jury testimony of the witness "would not, of course, be necessary." On the other hand, in concluding that the defense showing in that case was inadequate, the Court emphasized (at 398) that "proof of the conspiracy was overwhelming," apart from the evidence supplied by the witness whose grand jury testimony was sought. The Court also pointed out (*ibid*) that while this witness was the only one who testified to the making of the illegal agreement, the documentary evidence established that fact by "little less than proof positive."[40]

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[39] The quoted phrase was taken from *United States* v. *Proctor & Gamble*, 356 U. S. 677, a civil anti-trust suit, in which the Court rejected the defendants' pre-trial demand for the complete minutes of a grand jury investigation of the alleged violation which was the subject of the civil proceeding. The Court stated (at 683), "We do not reach in this case problems concerning the use of the grand jury transcript at the trial to impeach a witness, to refresh his recollection, to test his credibility and the like. Those are cases of particularized need where the secrecy of the proceedings is lifted discreetly and limitedly." (Ftn. omitted.) Since petitioners here, like the petitioner in *Pittsburgh Plate Glass*, requested the grand jury testimony for impeachment purposes, they presented a case of "particularized need" within the meaning of *Proctor & Gamble*. The term is evidently given a different meaning in *Pittsburgh Plate Glass*.

[40] But see the dissenting opinion, at 401, n. 1.

Thus, the Court indicated that a "particularized need" will be found to exist where the trial testimony of the witness on an important phase of the case supplies substantial evidence of guilt that is not merely cumulative. Again, the Court's statement (at 400) that, "Certainly, 'disclosure is wholly proper where the ends of justice require it,' "[41] may indicate that factors affecting the credibility of the witness and the reliability of his trial testimony likewise have a bearing on the existence of "particularized need".

In contrast to *Pittsburgh Plate Glass*, the showing in the present case satisfies these criteria of "particularized need" with respect to the four witnesses whose grand jury testimony was sought by petitioners.

1. It cannot be disputed that Mason, Fikes, Gardner and Locke were key prosecution witnesses. The testimony of each was essential to the government's case.[42]

As appears from the opinion below, the court relied almost entirely on four episodes in concluding that the existence of a conspiratorial agreement had been estab-

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[41] Quoting from *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 234.

[42] Aside from Lawrence, whose testimony we discuss *infra*, p. 42, the other witnesses were Bush, Petersen, and Moralez. Bush and Petersen, like Locke, gave testimony relating only to the pre-conspiracy period, mostly 1948. Bush merely identified the printed proceedings of Mine-Mill's 1948 Convention, showing that there was a difference about continuing the non-compliance policy and that he, as a delegate, supported the minority view that the policy should be changed while Dichter made a speech in support of the majority view—adherence to the policy. None of this was in dispute. Petersen testified that four of the petitioners (Dennis, Dichter, Skinner, and Travis) were Communists at the time, as he was, and as such, supported the non-compliance policy. Moralez, the only other witness for the prosecution, testified to nothing except the Communist Party membership of petitioner Skinner in the period 1952 to 1954.

Fikes—Fikes testified, as he had at the first trial, that in 1949 he was present at a meeting in Bessemer, Alabama, attended by Wilson, Lawrence, three others, and an official of the Communist Party (R. 213-18). The meeting discussed Mine-Mill's recent decision to comply with the Taft-Hartley Act and the letters of resignation from the Communist Party by certain Mine-Mill officers that compliance would necessitate.

The court below relied heavily on Fikes' testimony about this meeting as establishing that the resignations of the Mine-Mill officers from the Communist Party were not genuine and as implicating not only Wilson, but as we have seen, in proving the conspiratorial agreement. However, as the court below noted, there was a material difference between the accounts which Fikes gave at the two trials about what Wilson had said at the meeting. At the first trial, he quoted Wilson as saying that the letters of resignation "wouldn't mean anything and would be phoney". He did not repeat this at the second trial, or attribute to Wilson any statement to the effect that the resignations would be fictitious (R. 389; 346 F. 2d 10, 14). Instead, he put into the mouth of the Communist Party official the remark that the letters of resignation "would be on paper, only" (R. 216).[46] Furthermore, Lawrence (who had not testified at the first trial) did not corroborate either of Fikes' versions of the conversation, and his testimony contained no suggestion from any of the participants that the resignations would be spurious. On the contrary, Lawrence quoted Wilson as saying that "from this point on none of the Executive Officers . . . could have any connection with the Communist Party". (R. 248; 346 F. 2d 10, 14).

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[46] In quoting from Fikes' testimony, the opinion below erroneously attributes this remark to Wilson (R. 390, n. 2; 346 F. 2d 10, 14, n. 2).

Accordingly, Fikes' story about this critical episode was suspect, to say the least. Moreover, his credibility was undermined by evidence that he had twice lied under oath about his membership in the Communist Party and had given untruthful testimony in other proceedings concerning his whereabouts in certain years. (R. 257-68).

Gardner—Gardner's unreliability as a witness was shown by his uncorroborated testimony about an important conversation he had with Travis in October, 1951, when Travis commented on the difficulty he had been having about getting into Canada. According to Gardner, Travis said that "a great deal of his problems" arose because his public resignation from the Communist Party "was recognized pretty much as a subterfuge to avoid prosecution under Taft-Hartley and most people accepted the fact that he was still in the Communist Party" (R. 281). Gardner's testimony on the first trial in 1959 about what Travis had said on this occasion was substantially the same, including the reference to the resignation as a "subterfuge" (Record on Appeal Below, 631).

In 1958 and in 1960, however, Gardner's testimony in other proceedings about what Travis had said on the occasion in 1951 was basically quite different. In 1958, when testifying against Travis in the case against the latter under Section 1001 (*supra*, p. 6, n. 6), Gardner quoted Travis as saying that his public resignation "was a mistake because it gave the enemies of the Party an opportunity to use that in pointing out that his wasn't a true resignation from the Party, that actually it was done merely to conform to the Taft-Hartley affidavits . . ." (269 F. 2d 928, 935). In 1960, when testifying in an administrative proceeding, Gardner quoted Travis as saying that "neither the American nor the Canadian authorities believed his resignation was genuine. . . ." (Record on Appeal Below, 632). On cross-examination the next day, all that Travis said about his difficulty in crossing the border,

according to Gardner, was that he believed it was "because of the public resignation that he had made from the Party. . . ." (*Id.*, 633).

In short, Gardner's version on the two trials in this case (1959 and 1963) as to what Travis had said in 1951 differed not only from the version he had given in 1958 but also from the two differing versions he gave on successive days in 1960. The need, therefore, of discovering what version Gardner had given to the grand jury in 1956 about this conversation in 1951 can scarcely be exaggerated. Cf. *Jencks* v. *United States*, 353 U. S. 657, 66.

3. Furthermore, Gardner, Fikes, and Mason had reason to be biased and prejudiced.

a. Fikes and Gardner were accomplices. Fikes, according to his own testimony and that of Lawrence, was a participant in the Bessemer meeting—the one episode in the case about which there was direct evidence concerning the change to compliance and the consequent resignations from the Party of Mine-Mill officers. Gardner's testimony showed that, as a Communist, he knew of the Party membership of all the petitioners and, from his conversation with Dennis in 1951, that the resignations from the Party had taken place, at least in form.[47]

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[47] Gardner's testimony, then, shows him to be as culpable, if not more so, than any of the petitioners. The only evidence in the case that any petitioner knew that any other was a member during the alleged conspiracy was Gardner's testimony that he, Sanderson, Skinner, and two other persons attended a Party "meeting" in a hotel room in Denver in February, 1955. Sanderson and Skinner are the only petitioners who filed no affidavits during the indictment period and the purpose of the "meeting" was to discuss Gardner's activities as a union staff member in Montana, not compliance or the filing of affidavits (R. 303). Thus, on the one hand, only Gardner, according to his testimony, had reason to believe that the four petitioner-affiants (Dennis, Dichter, Travis, Wilson) may have filed false affidavits, while, on the other hand, there was no evidence in the case that any of the petitioners knew that any other who had filed affidavits was a Party member during the indictment period.

b. In addition, Fikes had been a paid informer for the FBI from 1953 until he testified on the first trial in 1959 (R. 222). As an informer, he had four conversations with Wilson in 1954 and 1955, and his testimony about the conversations was designed to show that Wilson was a Party member during that period (R. 222-28).

c. Gardner and Mason had reason to be prejudiced against Mine-Mill and petitioners. As a result of his factional difficulties as a staff member (R. 305), Gardner testified that he was "fired" in the spring of 1955 (R. 306). Mason, who had been a Mine-Mill Executive Board member, withdrew from Mine-Mill in 1953, advocated withdrawal from Mine-Mill by the local unions in Montana (his home base), and then led an unsuccessful effort in 1954 by a rival union to win the bargaining rights there in a Labor Board election (R. 158).

4. The nature of the evidence, coupled with the remoteness of the trial from the incriminating episodes, gave an uncommon dimension to petitioners' need for the grand jury testimony. The evidence, both of the existence of a conspiracy and of the participation of the individual petitioners, consisted entirely of testimony concerning oral statements of petitioners or of others in their presence, occasionally at meetings but most often in casual conversation. The testimony came from interested witnesses and was almost entirely uncorroborated. The trial took place in 1963, more than eight years after the last of these meetings and conversations and twelve years after the last of the most damaging statements (Dennis to Gardner in 1951) relied on to establish the conspiratorial agreement was said to have been made. Even assuming good faith and objectivity on the part of the four witnesses, their grand jury testimony in 1956 as to what was said in 1948—1955 was much more likely to be accurate than their recollections seven years later.[48]

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[48] "Every experienced trial judge and trial lawyer knows the value for impeaching purposes of statements of the witness recording the events before time dulls treacherous memory." *Jencks* v. *United States*, 353 U. S. 657, 667.

All of the foregoing circumstances demonstrate that petitioners had a "particularized need" for the grand jury testimony of the four witnesses. The issue under *Pittsburgh Plate Glass, supra*, at 400, therefore, is whether the need which was shown "outweighs the policy of secrecy". Just as the defense need for grand jury testimony was far weightier here than in that case, so the countervailing interest in secrecy was much weaker. *Pittsburgh Plate Glass* (*ibid*) emphasized that if grand jury testimony were disclosed, "not only would the participation of the jurors be curtailed, but testimony would be parsimonious if each witness knew that his testimony would soon be in the hands of the accused." And the Court added, "Especially is this true in anti-trust proceedings where fear of business reprisals might haunt both the grand juror and the witness."

Here, seven years elapsed between the sitting of the grand jury and the demand for the testimony. And meantime, the witnesses had appeared at two trials where they publicly recounted the events which were the subject of their grand jury testimony. Accordingly, there is no possible foundation for a supposition that disclosure of their testimony would operate as a deterrent to the grand jurors or witnesses either in this or in other cases. Again, this is not an anti-trust case. Petitioners had no means of reprisal against the witnesses or grand jurors and sought none.

Plainly, then, in this case the "particularized need" of petitioners outweighed the policy of secrecy.[49] The rule

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[49] Four reasons have been advanced for grand jury secrecy. *Pittsburgh Plate Glass*, at 405 (dissenting opinion). Two of these are irrelevant here—to prevent the accused from escaping before arrest or from tampering with the witnesses, and to prevent disclosure of derogatory information against an accused who is not indicted. The third reason—to encourage grand jury witnesses to testify freely without fear of retaliation—is, as shown in the text, likewise irrele-

of *Pittsburgh Plate Glass*, therefore, required the production of the grand jury testimony of the four witnesses directly to the defense.

B. Even if not producible directly to the defense, the grand jury testimony should have been produced for *in camera* inspection by the trial court.

If the Court were to hold that petitioners' showing was insufficient to warrant production of the grand jury testimony directly to the defense, a reversal would still be required because of the denial of petitioners' alternative motions for the trial court's *in camera* inspection of the grand jury minutes for inconsistencies with the trial testimony of the witnesses. *Pittsburgh Plate Glass* (at 401) reserved consideration of the circumstances under which such motions should be granted. We believe that if the rule of that case is adhered to with respect to production directly to the defense, *in camera* inspection should be granted as of course. Under any reasonable standard, however, it was error to deny such inspection in the present case.

1. Motions for *in camera* inspection have been granted as of course in the Second Circuit for some years. *United States* v. *Spangelet*, 258 F. 2d 338; *United States* v. *Hernandez*, 282 F. 2d 71; *United States* v. *Giampa*, 290 F. 2d 83; *United States* v. *D'Angiolillo*, 340 F. 2d 453, 457, cert. den'd, 380 U. S. 955; *United States* v. *LaVallee*, 344 F. 2d 313, 314-315. The court below, in agreement with decisions

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vant under the circumstances of this case. The fourth reason—to encourage free participation of the grand jurors by barring disclosure of their votes and comments—can readily be accommodated by deleting all such votes and comments from the minutes that are furnished petitioners, as the dissent in *Pittsburgh Plate Glass* suggests, 360 U. S. at 407.

in several other Circuits, applies the "particularized need" rule of *Pittsburgh Plate Glass* to such motions.[50]

The Second Circuit practice provides a measure of protection to the accused and invades the secrecy of the grand jury proceding only when the policy of secrecy is clearly overborne by the existence of inconsistencies between the grand jury and trial testimony of the witness. The practice in the Second Circuit appears to have occasioned the government no difficulties. Indeed, the government itself favored granting *in camera* inspection as of course until the reservation of the question in *Pittsburgh Plate Glass* led it to urge the "particularized need" requirement. Cf. *Pittsburgh Plate Glass* (at 408-09), and Brief for the United States (p. 20) in *United States* v. *Spangelet*, 258 F. 2d 338 (C. A. 2) with Brief in Opposition in the present case (pp. 14-15).

2. Even if *in camera* inspection is not to be absolutely required on motion of the defense, petitioners' showing of "particularized need" plainly required it in this

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[50] *3rd Circuit: United States* v. *Boyance*, 329 F. 2d 372, cert. den'd, *sub nom. Feldman* v. *United States*, 377 U. S. 965; *United States* v. *Bertucci*; 333 F. 2d 292, cert. den'd, *sub nom. Doherty* v. *United States*, 379 U. S. 839.

6th Circuit: United States v. *Bell*, 351 F. 2d 868, 875.

7th Circuit: United States v. *Micele*, 327 F. 2d 222, 226-27; *United States* v. *Keegan*, 331 F. 2d 257, 263.

8th Circuit: Berry v. *United States*, 295 F. 2d 192, 194-95, cert. den'd, 368 U. S. 955; *Brilliant* v. *United States*, 297 F. 2d 385, cert. den'd, 369 U. S. 871; *Hance* v. *United States*, 299 F. 2d 389.

The District of Columbia Circuit had granted *in camera* inspection when the testimony was of great importance, *Gordan* v. *United States*, 299 F. 2d 117, 313 F. 2d 582, cert. den'd, 374 U. S. 839; *Harrell* v. *United States*, 317 F. 2d 580, but most recently, has also expressed its rule in terms of "particularized need". *Frank* v. *United States*, 347 F. 2d 486, 490.

case.[51] Indeed, the court below stated that "it would have been safer to have inspected the grand jury testimony . . ." (R. 396; 346 F. 2d 10, 18). Without such an examination it is, of course, impossible to conclude that petitioners were not prejudiced by the trial judge's failure to adopt the "safer" course.[52] Nevertheless, the court was "unwilling to say the trial court committed reversible error by refusing the *'in camera'* inspection" (R. 396; 346 F. 2d 10, 18).

The justification for this ruling was that no "manifest inconsistency" had been shown between the testimony of the witnesses and their prior statements. This is inaccurate because, as we have seen, Locke, Fikes and Gardner were shown to have made prior inconsistent statements. It is also irrelevant because the significant impeachment of a witness by other means might well lessen the need for his grand jury testimony, not make it more acute. Indeed, in *Parr* v. *United States*, 265 F. 2d 894, 903 (C. A. 5), rev'd on other grounds (363 U. S. 370), direct production, and in *Simmons* v. *United States*, 308 F. 2d 324, 325-26 (C.A.D.C.), *in camera* inspection, were denied because the witness had already been sufficiently impeached.

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[51] The fact that the witnesses were important would have entitled petitioners to *in camera* inspection in the District of Columbia Circuit, *supra*, p 48, n. 50. And that fact plus the fact that Fikes and Gardner were accomplices would have required the trial court to inspect their testimony in the Seventh Circuit. *United States* v. *Micele*, 327 F. 2d 222, 226-27.

[52] Strangely enough, in *Travis* v. *United States*, 269 F. 2d 928, rev'd on other grounds, 364 U. S. 631, Chief Judge Murrah, author of the opinions in the present case, dissented from the denial of *in camera* inspection on the ground (269 F. 2d at 946-47) that "there was no conceivable way of showing a particularized need unless the accused could get the grand jury testimony before the court".

C. The "particularized need" requirement of *Pittsburgh Plate Glass* should be reconsidered.

1. In *Pittsburgh Plate Glass*, the Court for the first time enunciated the principle that, under some circumstances, the grand jury testimony of a prosecution witness should be furnished directly to the defense for impeachment purposes. The enunciation of this principle, however, has not been followed by its implementation in the lower federal courts. Instead, the decision has become the authority for denying production of grand jury testimony to the defense.[53] Moreover, in those Circuits which make "particularized need" a prerequisite for *in camera* inspection, the effect of *Pittsburgh Plate Glass* has been to place severe limitations on this means of access to relevant grand jury testimony.[54]

Thus, experience since *Pittsburgh Plate Glass*, as exemplified by the present case, has confirmed the fear of the dissenting Justices (360 at 403) that "as a practical matter" the decision would foreclose defense access to grand jury testimony "even when the possible prejudice to the

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[53] In *De Binder* v. *United States*, 292 F. 2d 737 (C. A. D. C.), production to the defense was approved, but thereafter the same court has sanctioned only *in camera* inspection, *supra*, p. 48, n. 50. Otherwise, the courts have uniformly denied production directly to the defense. *Parr* v. *United States*, 265 F. 2d 894 (C. A. 5), rev'd on other grounds, 363 U. S. 370; *United States* v. *Killian*, 275 F. 2d 561, 571-72 (C. A. 7), rev'd on other grounds, 368 U. S. 231; *United States* v. *Coduto, et al.*, 284 F. 2d 464, cert. den'd, 368 U. S. 955 (C. A. 7); *United States* v. *Nasser*, 301 F. 2d 243 (C. A. 7); *United States* v. *Smith*, 335 F. 2d 898 (C. A. 7); *Ogden* v. *United States*, 303 F. 2d 724, 741-42 (C. A. 9); *Travis* v. *United States*, 269 F. 2d 928 (C. A. 10), rev'd on other grounds, 364 U. S. 631; *Bary* v. *United States*, 292 F. 2d 53 (C. A. 10).

[54] Among the cases cited *supra*, p. 48, n. 50, only two in the District of Columbia Circuit (*Gordan* v. *United States*; *Harrell* v. *United States*) and one in the Seventh (*United States* v. *Micele*) have held that the trial court should have made the inspection.

accused in a criminal case is crystal clear and none of the reasons justifying secrecy is present."

2. Paradoxically, *Pittsburgh Plate Glass* and *Proctor & Gamble* have been the authorities relied upon in a growing number of civil anti-trust cases to make grand jury testimony in antecedent criminal cases available for discovery purposes. *Atlantic City Electric Company, et al.* v. *A. B. Chance Company, et al.*, 313 F. 2d 431 (C. A. 2);[88] *Allis-Chalmers Mfg. Co.* v. *City of Fort Pierce*, 323 F. 2d 233 (C. A. 5); *U. S. Industries, Inc.* v. *United States District Court*, 345 F. 2d 18 (C. A. 9); *Herman Schwabe, Inc.* v. *United Shoe Machinery Corp.*, 194 F. Supp. 763 (D. Mass.); *Commonwealth Edison, et al.* v. *Allis-Chalmers Mfg. Co., et al.*, 211 F. Supp. 729 (N. D. Ill.); *Consolidated Edison Co.* v. *Allis-Chalmers Mfg. Co., et al.*, 217 F. Supp. 36 (S. D. N. Y.); *United States* v. *Badger Paper Mills, Inc.*, 243 F. Supp. 443 (E. D. Wis.); *In re Sellers*, 32 F. R. D. 473 (N. D. Ill.).

In civil anti-trust cases, then, the tendency to make grand jury testimony available, even before trial, is growing steadily—despite the Court's observation in *Pittsburgh Plate Glass*, at 400, that in anti-trust cases "fear of business reprisal might haunt" the witness before the grand jury if he knew his testimony would be disclosed. But in criminal cases, as we have seen, the policy of secrecy is still almost absolute, even after the witness has testified, in face of the principle that "evidence relevant and material to his defense" should be made available to the accused, *Jencks*, 353 U. S. 657, 667, and even though in a criminal case the interest of the government is not to win but to see that justice is done. *Berger* v. *United States*, 295 U. S. 78, 88.

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[88] In the *Chance* case, Justice Harlan denied a stay pending certiorari because, he said, in view of *Proctor & Gamble* and *Pittsburgh Plate Glass*, there was no reasonable expectation that certiorari would be granted. 10 L. ed. 2d 122, 83 Sup. Ct. 964.

3. Moreover, experience has fortified the view of the dissenters in *Pittsburgh Plate Glass* that *in camera* inspection of grand jury minutes by the trial judge can never be a satisfactory substitute for production of the relevant testimony directly to the defense. 360 U. S. at 408-09. In the first place, as the remarks of the trial judge in the present case reveal, examination of the minutes for inconsistencies with the trial testimony is a trying and time-consuming task which prolongs the trial and places a burden on a busy judge which he is understandably loathe to assume.[56] Furthermore, the cases underscore the truth of the observation in the dissenting opinion (at 410) that, "it will be extremely difficult for even the most able and experienced trial judge under the pressure of conducting a trial to pick out all of the grand jury testimony that would be useful in impeaching a witness".[57] See *United States* v. *Spangelet*, 258 F. 2d 338; *United States* v. *Zborowski*, 271 F. 2d 661; *United States* v. *McKeever*, 271 F. 2d 669, in each of which the Court of Appeals for the Second Circuit found inconsistencies which had escaped the trial judge. And when inconsistencies are found, judges will differ as to whether they are useful for impeachment. Thus,

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[56] Before finally ruling on the first of petitioners' production motions, the trial judge stated: "I am not deciding whether I am going to examine them *in camera* or not. I would like to see the bulk of them and so forth, because, gentlemen, we can either stretch this trial out for three or four months, or we can handle it within a few weeks . . . I am not going to spend my nights reading FBI statements or Grand Jury minutes. I am going to rest, because I am tired after one of these days . . . I don't think there has been a need shown and if the task doesn't appear to be too burdensome or too onerous, I would be willing to read them, but if I find I have got to read volumes and volumes, I am not going to do it until a higher Court tells me I have to" (R. 65-66).

[57] In the opinion below in *Pittsburgh Plate Glass*, Chief Judge Sobeloff made similar observations and also pointed out that to impose this task on the trial judge draws him "too deeply into the partisan task of preparing the cross-examination". 260 F. 2d 397, 404.

in *Gordan* v. *United States*, 313 F. 2d 582 (C.A.D.C.), cert. den'd, 374 U. S. 839, the majority thought the trial judge correct in finding no inconsistencies which might have been useful to the defense, but Chief Judge Bazelon, dissenting, found nine of them (313 F. 2d at 583-85).

Accordingly, we believe that the "particularized need" requirement of *Pittsburgh Plate Glass* should be reconsidered [58] and that the relevant grand jury testimony of a prosecution witness should be made available to the defense on its request, as is now the case under 18 U. S. C. 3500 with relevant prior statements of the witness to other agencies of the government.[59]

CONCLUSION

It is respectfully submitted that the judgment of the court below should be reversed.

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[58] There has been critical comment on the *Pittsburgh Plate Glass* decision. See, *e.g.*, Louisell, *Criminal Discovery: Dilemma Real or Apparent?*, 49 Calif. L. Rev. 56, 68-71 (1961); *Traynor, Ground Lost and Found in Criminal Discovery*, 39 N. Y. U. L. Rev. 229, 232-33 (1964), citing other critiques, 232, n. 20.

[59] It should be observed that a troublesome issue which Section 3500 has generated, that is, whether a particular document is a "statement" as defined in subsection (e), does not of course arise in connection with grand jury testimony.

APPENDIX

Statutes Involved

CONSTITUTION OF THE UNITED STATES:

Art. I, Sec. 9, Cl. 3 provides: No Bill of Attainder or *ex post facto* Law shall be passed.

The First Amendment provides: Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The Fifth Amendment provides, in pertinent part: No person shall ——— be deprived of life, liberty, or property, without due process of law; ———.

STATUTES:

1. 18 U. S. C. 371 provides:

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

2. 18 U. S. C. 1001 provides:

Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false,

fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

3. 29 U. S. C. 159(h) (Section 9(h) of Taft-Hartley) provided [1]:

No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under subsection (c) of this section, and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of section 160 of this title, unless there is on file with the Board an affidavit, executed contemporaneously or within the preceding twelve-month period by each officer of such labor organization and the officers of any national or international labor organization of which it is an affiliate or constituent unit that he is not a member of the Communist Party or affiliated with such party, and that he does not believe in, and is not a member of or supports any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods. The provisions of sections 286, 287, 1001, 1022 and 1023 of Title 18 shall be applicable in respect to such affidavits.

4. 29 U. S. C. 504 (Section 504 of the Labor-Management Reporting and Disclosure Act of 1959) provides, in pertinent part:

(a) No person who is or has been a member of the Communist Party . . . . shall serve ———

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[1] Repealed by Section 201(d) of the Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 519, 525.

(1) as an officer, director, trustee, member of any executive board or similar governing body, business agent, manager, organizer or other employee (other than as an employee performing exclusively clerical or custodial duties) of any labor organization . . . during or for five years after the termination of his membership in the Communist Party . . . . .

(b) Any person who willfully violates this section shall be fined not more than $10,000 or imprisoned for not more than one year, or both.